

## Burlington Development Review Board

149 Church Street, City Hall  
Burlington, VT 05401

[www.burlingtonvt.gov/pz/DRB](http://www.burlingtonvt.gov/pz/DRB)

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Austin Hart  
Brad Rabinowitz  
Israel Smith  
AJ LaRosa  
Geoff Hand  
Alexandra Zipparo  
Samantha Tilton  
Jim Drummond, (Alternate)  
Robert Purvee, (Alternate)



### BURLINGTON DEVELOPMENT REVIEW BOARD Tuesday October 3<sup>rd</sup>, 2017, 5:00 PM Contois Auditorium, City Hall, 149 Church St, Burlington, VT MINUTES

**Board Members Present:** Austin Hart, Brad Rabinowitz, Israel Smith, AJ LaRosa, Geoff Hand, Alexandra Zipparo, Samantha Tilton

**Board Members Absent:** Jim Drummond (Alt), Robert Purvee (Alt)

**Staff Present:** Scott Gustin, Ryan Morrison, Layne Darfler

#### I. Agenda

43 Starr Farm Rd Deferral to later date

#### II. Communications

None

#### III. Minutes

Minutes from September 19<sup>th</sup>, 2017 will be considered at the next deliberative meeting

#### IV. Consent

##### 1. 18-0222CA; 1 King Street Dock (DW-PT, Ward 3C/5S) Lake Champlain Transportation Company

Removal of 5,000 gallon partially underground fuel tank, piping, and 3 concrete islands for dispensers. Installing 10,000 gallon above ground fuel tank with 14'x28' concrete pad, anchor bolts, new piping and 3 islands for dispensers. Also 12 concrete filled bollards surrounded by an 8' high wooden fence

(Project Manager: Ryan Morrison)

A.Hart: Requestd this item be brought into public hearing

No objections

A.Hart: Does the applicant have any questions or concerns about conditions or staff findings as presented?

None

A.Hart: Are there any members of the public that wish to comment or have questions regarding the project?

None

A.Hart: Installing a 10,000 gallon tank next to the lake is reason to ask more questions; the materials for flood hazard review, have they been received back from the State?

R.Morrison: there has been not materials or comments received back from State review, at this point they have missed their 30 day period to comment.

A.Hart: In the ordinance there are requirements for engineer reports, etc. when are those followed up or reviewed by staff or can they be reviewed by staff?

R.Morrison: They can be reviewed by S.Gustin or myself as we are both Certified Floodplain Managers.

A.Hart- What is the required timeline of that review, how does that work?

R.Morrison: Planning and Zoning are working on updating a list to fulfill these requirements but currently it is still a work in progress. This review is required before the Certificate of Occupancy can be issued.

S.Gustin: something for anchoring would be reviewed before the Certification of Occupancy would be issued.

A.Hart: Critical components or issues would be anchoring and how high the tanks are installed versus the high lake levels. Regarding the flood hazard area and being properly anchored, is there a separate process the applicant has to go through for review of leakage or spills?

B.Brosseau: Engineer will have a spill prevention/containment plan; currently in process with DEC for facility. The tanks are double walled for puncture prevention.

A.Hart: The base of the tanks as installed- what is the elevation there?

R.Fox: 99.95 ft is the elevation of that dock

A.Hart: Water could increase to 102 ft?

Correct

A.Hart: Do any Board member have any further questions?

None

A.Hart: Are there any members of the public that wish to comment or have questions regarding the project?

None

A.Hart: Does the applicant have any questions or concerns?

None

A.Hart: Closes the Public Hearing

**2. 15-0339VR; 31 NORTH AVENUE (RM-W, Ward 3C) Cynthia Smith**

Time Extension Request: Variance from front yard setback. Property fronts Depot Street.  
(Project Manager: Scott Gustin)

A.Hart: Has the applicant received staff comments or does the applicant have any questions or concerns about conditions or staff findings as presented?

Applicant had not received staff comments, S.Gustin briefly reviewed.

A.Hart: Do any Board member have any further questions?

None

A.Hart: Are there any members of the public that wish to comment or have questions regarding the project?

None

A.Hart: What is the limit of the number of extensions that an applicant may receive?

S.Gustin: 3

I.Smith: Motion to approve and adopt staff findings and recommendations

B.Rabinowitz: Seconds the motion

7-0-0

**V. Public Hearing**

**1. 17-1267AP; 43 STARR FARM ROAD (RL, Ward 4N) Ventas Realty LP**

Appeal of zoning violation notice #334328.

(Project Manager: Jeanne Francis)

A.Hart: Recused

B.Rabinowitz: Applicant has requested deferral to a later date, is there a date requested?

S.Gustin: Suggesting November 8<sup>th</sup> or the 21<sup>st</sup>

B.Rabinowitz: Are there any members of the public who wish to speak about this project?

None

A.LaRosa: Motion to defer to November 8<sup>th</sup> 2017

A.Zipparo: Seconds the motion  
7-0-0

2. **18-0072AP; 204 NORTH AVENUE (RM, Ward 3C) Pierre Gingue**  
Appeal of NOV #335900 as it relates to usage as a three dwelling unit.  
(Project Manager: Jeanne Francis)

A.Hart: As the City has filed the Notice of Violation we will have them speak first

K.Sturtevant: Notice of Violation issued for increasing number of units from a duplex to a triplex. Initial action was taken in 2010 for converting from a single family to a triplex. Action was abandoned due to a mistake with the property address 204 North Avenue and 204 ½ North Avenue. No permits on property listed as 204 North Avenue for change in use from duplex to triplex.

A.Hart: The appeal says this has been used as a triplex since 92 or 95, is there any more dispute about the date the use began?

K.Sturtevant: Their (the appellant's) assertion is that based on taxes, it has been that way since sometime in the 90's.

A.Hart: What happened in 2010, the Notice of Violation was brought on a specific issue but the confusion of property address resulted in it being dropped and then withdrawn in 2017  
Correct

K.Sturtevant: There was confusion over the property address of 204 North Avenue and 204 ½ North Avenue, they put the Notice of Violation on hold until they could figure out that issue and it ultimately fell off the radar.

A.LaRosa: The issue fell off the radar but then a similar Notice of Violation was issued in 2010?

J.Francis: The original notice was for the conversion from single family to triplex

A.LaRosa: Now the notice is due to the duplex converting to triplex?

A.Hart: What was the confusion regarding the property?

J.Francis: The house directly behind it is a single family addressed as 204 ½ North Ave. Permitting went under 204 North Ave, not 204 ½ North Ave. So Building Permit listed it as single family. The change then was single family to triplex.

A.LaRosa: How is going from a duplex to a triplex a change in use?

K.Sturtevant: Under the ordinance it is a different use as listed in the Use Table.

A.LaRosa: So the break in the use is going from 2 to 3 units?

Correct

B.Rabinowitz: The statute of limitations does not apply here because it is a use violation

Correct

A.Hart: Bottom line the conversion from the duplex to a triplex sometime in the 90's was never permitted

Correct

A.LaRosa: The remedy to remove the use seems onerous, what would be the problem with the appellant applying for the triplex?

K.Sturtevant: It would not conform to current standards under the ordinance

A.LaRosa: Would it have qualified under the 92 ordinance?

K.Sturtevant: Not aware, but can look into it

A.Hart: Does the board have any other questions for the City before we ask the appellants to come forward?

None

J.Franco: Preface remarks with what the issue is. Board should have copy of the Original Notice of Violation which sets out the chronology of what happened and when the conversion from a duplex to a triplex seems to have occurred. First three bullets are very important, these are representations by City staff. First one being that in 1985 assessor's card identified the property as a two unit. By October 21<sup>st</sup>, 1993 it states the Assessor's staff completed an inspection found the structure had increased its units to three. Inspector noted and signed on the 1994 Assessor's card. We know that by 1993 it was a triplex. Property was previously owned by Sam Conan, recollection was that he converted the structure in August of 1992 and his narrative was that it was left up to the contractor to get the permits. Issue here is about the statute of limitations, transition happened well beyond the 15 year statute of limitations. The

enforcement division has argued that there is something called a Continuing Use Exception to the statute of limitations and that there's effectively no statute of limitations because it is being used as a triplex. We disagree with that analysis. Provided handout with evidence believed to show why that is not true.

K.Sturtevant: City had not received previously

J.Franco: First document is the actual statute to limitations which is title 24 section 44.54.a; The language of the statute of limitations. Reviewed highlighted sections. Believes it falls under statute of repose not continuing use. The next document is section 44.49 What's the triggering occurrence here. Reviewed highlighted sections. Sometime in 1992 or 1993 the conversion from a duplex to a triplex took place, that we don't dispute required a permit and it was not obtained. It is argued that that is what is the triggering event for 44.54.a and that's where you start running the 15 year statute.

B.Rabinowitz: In the same paragraph it talks about sub chapter 10 chapter 61 what is that?

J.Franco: That is the environmental division, Act 250 enforcement it is not Title 24. Heard the argument that there is a decision from the environmental court in the case of City of St. Albans Vs. Hayford; where the former environmental court judge adopted the violation theory, that's true. But as attached in handout there was a decision from the Vermont Supreme Court in 2008 in footnote; the Supreme Court declined to adopt that rule at least at that point in time. Not aware of any case where the Supreme Court stated the adoption.

A.LaRosa: Are you contending that the continuing use violation is not a statutory one but a trial court order not evasive law like a Supreme Court decision?

J.Franco: Not sure if the currently constituted environmental court has adopted the continuing use rule. There has been no decision by the Vermont Supreme Court adopting the continuing use rule, more importantly saying that 44.54.a is not a statute of repose. If you adopt a continuing use theory that's being advanced by the planning department you can take all of the land titles in the City of Burlington and the certainty of those things and throw them in the waste basket. Think about the allegation here originally the allegation was conversion from a single family to a triplex. Nobody could figure out when the conversion, if there was one, from single family home to duplex ever occurred. When did the City adopt zoning? Is there anyone around to testify about that? Reviewed a discussion about the statute of limitations. You cannot through interpretation re-write the statute.

P.Gingue: Sam Conan said that the project was given to a contractor to get permits and didn't know what permits were obtained. That contractor is no longer alive so therefore there is no way to know what he actually did. The building is being used for affordable housing, refugees and section 8. This situation is going to affect everyone in the building.

A.LaRosa: Are all 3 units being utilized? So if a unit was removed it would leave people out of housing.

Confirmed

J.Franco: In terms of the discussion of what is the statute of repose; stability security finality to disputes and what's going to happen here is something that has been an accepted use is now not accepted. The statute of limitations ran quite a long time ago.

A.Hart: Mr. Gingue, you acquired the building in 2002. What happened in 2010 seems there was 2 parties to the notice of violation, the issue was raised and then disappeared. Why did nothing happen for 7 years?

P.Gingue: No clue, was given the notice of violation and tried to get a permit. Was told the permits had been destroyed by pigeon waste in the City's attic storage location. Disputed the violation and nothing ever happened. Appeal was brought before the DRB.

A.Hart: Continued but never brought back

J.Franco: Would like to note the doctrine called Stale Prosecutions, which states that there is some obligation upon enforcement authorities the thing in a timely manner. Ability to interview the contractor has now lapsed as he has passed away.

G.Hand: Was there any period of time that it was not a triplex under your ownership?

P.Gingue: No

B.Rabinowitz: Assessor's records are often brought up where it is assessed for what is unpermitted for, is there any effort to coordinate records between departments?

S.Gustin: Yes, now there is coordination, back then there wasn't

A.Hart: Does the Board have any other questions?

None

A.Hart: Calls the City back to respond  
K.Sturtevant:

Ghand- any period of time that is was not a tri under your ownership  
No

Br- assessors records are often brought up where it is assessed for what it is unpermitted for, is there any effort to coordinate records between dept.

Sg- yes, now there is coordination, back then there wasn't

Br- what about property transfers – does this come out at prop transfers

Sg- yes

Ahart- anything else

None

Ahart- city response

K.Sturtevant: Mr. Franco raised the issue of the statute of limitations exceptions and the status at the court level. Agree that the St. Albans case the Supreme Court found that they held their ruling on a different issue so they didn't address that specifically. There have been other decisions in which the environmental division, different judges, has upheld the exemptions. One case in Nov 2008, judge Drukin, states "we first note that some actions are not time bard at all, in particular any zoning violation that involves public health risk or hazard can be enforced at any time regardless of when these violations commenced". Then he also states

G.Hand: We don't have a health safety issue here do we?

K.Sturtevant: No there is not a claim for that. They also state similarly the 15 year statute of limitations does not apply to use violations, which are seen as continuous violations. He cites City of Burlington V. Richardson 2003.

A.Hart: That's an environmental division case?

Confirmed

K.Sturtevant: Distinguishing ongoing use violations and a onetime construction violations. Appeal of Gothier, which is also a Judge Dirkin case, noting that when the underlying enforcement efforts referred to a change in use they are not time bard.

A.Hart: Are you aware of any environmental divison that refused to adopt the continuing violation rule?

K.Sturtevant: Not aware of any

G.Hand: Can you speak to why it's important to the City that we apply the continuing violation approach?

K.Sturtevant: There are a lot of opinions on it, recently there was a proposed zoning amendment that would have refined this but it was turned down because the policy decision was to continue with the use exemption. There are concerns of the intensity of the use of a property and the effects the use can have being greater than the particular property, but on the whole neighborhood. Effects on parking, effects on congestion, and in this case in particular the property under current regulations would only allow a one unit property to be there.

A.Hart: Other questions?

None

K.Sturtevant: There is a general statutory in our regulations and in State statute and in planning in general about doing away with non-conformities; you want your zoning uses to conform to the current zoning.

J.Franco: The other side of the argument is of course the Supreme Court has yet to adopt this continuing use argument. The other thing that we have here is again state of prosecution. Capital Savings Co V Hammond 1921 Vermont 47 states there has to be a timely prosecution.

G.Hand: Did your client do anything to re-raise the issue?

J.Franco: It was the City that was doing the investigation. The City asked for the continuance and we were waiting for the City to conclude its work. Nothing happened.

G.Hand: So you didn't come back with any requests.

J.Franco: It is not our obligation to do that it is the prosecutor's obligation to go forward and prosecute the case. Another example case is Strue V. Board of County Commissioners (Colorado) 2010 California Case talked about a delay in prosecution. If we are truly arguing over a use violation, again there shouldn't be a duplex there. When was the duplex created, how was it created, was it permitted? I don't know how you reconcile this.

A.Hart: Do any members of the Board have any more questions?

None

A.Hart: Are there any members of the public who wish to comment on this project?

None

K.Sturtevant: Without looking at the cases that Mr. Franco referred to, I can't tell you if those were criminal cases or what type of cases they were. But in this case were talking about zoning and we're talking about something that's exempt from statute of limitations because it's a use exemption which means the violation continues and everyday it's a new violation. The other part of that is the property owner continued to rent out the property, did not suffer a harm for less for that delay because they continued to be able to have the extra unit income.

A.LaRosa: It is assessed as a triplex, so it has also been taxed for the extra unit. So there are benefits and burdens on both sides.

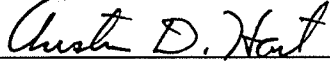
K.Sturtevant: Yes, but the income would have been much greater than the tax.

A.Hart: Closes the public hearing

**VI. Other Business**

**VII. Adjournment**

The meeting adjourned at 5:53 PM



Austin D. Hart, Chair of Development Review Board

Oct. 25, 2017

Date



L. Danfer, Planning Technician

Oct. 25, 2017

Date

Plans may be viewed in the Planning and Zoning Office, (City Hall, 149 Church Street, Burlington), between the hours of 8:00 a.m. and 4:30 p.m.

Participation in the DRB proceeding is a prerequisite to the right to take any subsequent appeal. Please note that ANYTHING submitted to the Planning and Zoning office is considered public and cannot be kept confidential. This may not be the final order in which items will be heard. Please view final Agenda, at [www.burlingtonvt.gov/pz/drb/agendas](http://www.burlingtonvt.gov/pz/drb/agendas) or the office notice board, one week before the hearing for the order in which items will be heard.